TEOH CHANG CHEN

v.

KOTA SETAR REALTY & DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 33 OF 1984]
21 OCTOBER 1991

CONTRACT: *Breach of contract - Allegation of fraud and transfer executed complained as unlawful - Allegation of collusion among the three defendants - Counterclaim for misrepresentation and defamation.*

EVIDENCE: *Solicitor who handled the transfer of the said property from 1st defendant to 3rd defendant not called to give evidence*

LAND LAW: *Conveyance of Land - Assignment - In favour of 3rd defendant - Time of essence.*

The agreed facts in this case are as follows. In or about May 1976, the plaintiffs purchased a piece of land comprised in Lot 1505, Mukim Alor Merah, Kota Setar, Kedah from the 1st defendant at a price of RM31,142.

Plaintiffs paid several payments by way of instalments to the 1st defendant until the 1st defendant arranged a loan from the 2nd defendant in respect of the purchase of the said land and the plaintiffs continued the instalment payment to the 2nd defendant.

By an assignment dated 16 April 1979, the plaintiffs agreed to assign their rights of purchase of the said property in favour of RM40,000. Time was of the essence of the said assignment.

In early 1982, the said piece of land was transferred by the 1st defendant to the 3rd defendant.

It is also not disputed that pursuant to a High Court order the land was registered in the name of the 3rd defendant on 10 February 1982.

Held:

[1] It is abundantly clear that there is not an iota of evidence of fraud against the 3rd defendant, let alone any evidence that the 2rd defendant colluded with the 1st defendant and the 3rd defendant to defraud the plaintiffs.

[2] By K accepting the payment as the solicitor for the plaintiffs the condition which the plaintiffs agreed in regard to payment by the 3rd defendant by "end of July 1979" and that this condition which was a variation of the condition in clause 3 of the assignment and was not pleaded or the condition to pay by the date of approval of the assignment was varied and therefore there was no breach of contract.

[3] The onus of proof of fraud is proof beyond reasonable doubt but in the present case there is not an iota of evidence to support the plaintiffs' allegation of fraud.

[4] There was nothing in the evidence which showed that at the time the plaintiffs assigned their rights in the land to the 3rd defendant, the plaintiffs knew that the land was subject to a bumiputra quota and that the sale had exceeded the quota.

[Plaintiffs have abandoned their claim against the 1st defendant. Action against the 2nd

defendant dismissed with costs. The action against the 3rd defendant is dismissed with costs. The 3rd defendant's counterclaim against the plaintiffs is dismissed with costs.]

Case referred to:
Saminathan v. Pappa [1981] 1 MLJ 121 ***(foll)***

JUDGMENT

KC Vohrah J:

The agreed facts in this case are as follows. In or about May 1976 the plaintiffs purchased a piece of land comprised in Lot 1505, Mukim Alor Merah, Kota Setar, Kedah from the 1st defendant at a price of RM31,142.

The plaintiffs subsequently paid several payments by way of instalments to the 1st defendant until the 1st defendant arranged a loan from the 2nd defendant in respect of the purchase of the said land and the plaintiffs continued the instalment payments to the 2nd defendant.

Subsequently by an assignment dated 16 April 1979, the plaintiffs agreed to assign their rights of purchase of the said property in favour of the 3rd defendant in consideration of RM40,000. Time was of the essence of the said assignment.

In early 1982, the said piece of land was transferred by the 1st defendant to the 3rd defendant.

It is not disputed that pursuant to a High Court order the land was registered in the name of the 3rd defendant on 10 February 1982.

The main complaint of the plaintiffs is directed against the 3rd defendant. Against the 3rd defendant the plaintiffs allege breach of contract. They complain that time was of the essence in the deed of assignment and that the 3rd defendant had defaulted in his payment of the balance of the consideration to them and that he had no right to the property. They also allege fraud against the 3rd defendant. They allege that he colluded with the 1st and 2nd defendants to defraud them by having their land registered in his name.

They also complain that the 1st defendant had wrongfully and without their consent executed the transfer to the 3rd defendant.

And the plaintiffs complain that the 2nd defendant had released the title deed of the land to the 3rd defendant without their knowledge and consent and this enabled the 3rd defendant to register the land in his name.

The plaintiffs pray, *inter alia,* for a declaration that they are the rightful owners of the land and for an order that the 3rd defendant transfer the said land to them.

It is to be noted that the plaintiffs have abandoned their claim against the 1st defendant.

In regard to the allegation of fraud against the second defendant and the allegation that the second defendant colluded with the 1st and 3rd defendant to defraud the plaintiffs, the second defendant denies the allegations.

As for the 3rd defendant he says that the time for payment of the balance of the consideration was extended and he counterclaims for damages. He alleges, firstly, that the plaintiff had fraudulently misrepresented to him that the property was unencumbered when in actual fact it was subject to a restriction imposed by the State Authority although this restriction was subsequently removed by the High Court as being invalid. He also claims for damages for having been defamed by the plaintiffs.

It has to be noted that the above claims of the plaintiffs based on breach of contract and fraud are alternative claims. The main averment in the statement of aim is that the transfer of the land in favour of the 3rd defendant was as a result of professional negligence of the solicitor who handled the transaction. It will be noted that the solicitor who acted to transfer the property from the 1st defendant to the 3rd defendant is not a party to the suit and was not called to give evidence.

The Evidence

The plaintiffs are husband and wife. The husband, PW1, gave evidence that they decided to sell the piece of land because the wife did not want to build a bungalow on the lot; presumably the lot was meant for a bungalow to be built on it.

What was in evidence was that the said land was never registered in the name of the plaintiffs after they had purchased the land in May 1976, for RM31,142. It was still registered in the name of the lst defendant when the plaintiffs decided to sell their property to the 3rd defendant. The plaintiffs needed the consent of the 1st defendant before they could assign their property rights. And they also needed to consult the 2nd defendant. PW1 approached DW2, then an officer, now the manager of the 2nd defendant, about his intention to sell the land and to settle the loan the 2nd defendant had advanced to the plaintiffs RM 24,000 for the purchase of the land. The plaintiffs then owed the 2nd defendant RM24,000. DW2 agreed to the assignment of rights to the land to the 3rd defendant provided that the then solicitor for the plaintiffs, Mr. Khoo (DW4) (who also acted for the 2nd defendant) would give an undertaking to the 2nd defendant to settle the balance of the loan amount after the transfer of the said land to the 3rd defendant. Mr. Khoo, with the consent of the plaintiffs, gave the undertaking. The assignment was then drawn up by Mr. Khoo. It was executed on 18 April 1979 for a consideration of RM40,000. Therein the plaintiffs agreed to assign their rights in the said land to the 3rd defendant subject to the approval of the 1st defendant.

It has to be pointed out that although it is pleaded in para. 3 of the statement of claim that the 3rd defendant failed to pay the balance of the purchase price of RM36,000 on or before 14 July 1979, the uncontradicted evidence shows that the 3rd defendant however paid to the plaintiffs RM10,000 on 12 July 1979 and promised in a letter to the plaintiffs to settle the balance of RM26,000 by "end of July 1979."

There was, however, no further payment by the 3rd defendant by or on 31 July 1991. And it has to be pointed out that the approval of the assignment by the 1st defendant was given at a later date 8 July 1979.

After the 1st defendant had executed the necessary instrument of transfer for the property to be transferred and registered in the name of the 3rd defendant the instrument was presented to the Collector of Land Revenue, Kota Setar. The instrument was rejected on the ground that that piece of land could not be transferred to a non-bumiputra as that lot was in excess of the quota of lots allocated for sale to non-bumiputras. The 1st defendant and the 3rd defendant appealed to the High Court against this decision and on 16 December 1981, obtained an order for its registration in the name of the 3rd defendant. This land was registered in the name of the 3rd defendant on 10 December 1982.

Complaint against the second defendant

It is convenient at this stage to deal with the only complaint of the plaintiffs against the second defendant, that he colluded with the 1st and 2nd defendants to defraud the plaintiffs. The allegation of fraud is contained in para. 7 of their statement of claim as follows:

Particulars of Fraud of the 2nd defendant

(a) releasing the title deed to the Solicitors handling the transaction without the knowledge and consent of the plaintiffs though having full knowledge that the plaintiffs were the purchasers of the said land from the lst defendant:
(b) releasing the title deed of the said land without the authorisation of the plaintiffs.

The evidence adduced, however, shows that the second defendant was never in possession of the issue document of title in respect of the said land. This was the undisputed evidence of DW2, the manager of the 2nd defendant presently and who then as an officer of the 2nd defendant handled the plaintiff's matter at the relevant times. And the undisputed evidence shows that the plaintiffs had voluntarily approached the 2nd defendant to settle that loan which had been advanced to them for the purchase of the said land as they intended the said land; and they gave their consent to their solicitor, Mr. Khoo to give an undertaking to the 2nd defendant to settle the loan amount. It was only after this undertaking had given that the document assigning the plaintiffs right in the property to the 3rd defendant was drawn up and executed. And consequent upon that, the evidence shows, the plaintiffs stopped paying towards the loan they had originally taken and they did not communicate with the 2nd defendant. It is abundantly clear that there is not an iota of evidence of fraud against the 2nd defendant, let alone any evidence that the 2nd defendant colluded with the 1st defendant and the 3rd defendant to defraud the plaintiffs. The claim of the plaintiffs against the 2nd defendant must fail.

Complaint against the Third Defendant

The plaintiffs alleges breach of contract on the part of the 3rd defendant and also his collusion with the 1st and 2nd defendants to defraud them. The particulars of fraud alleged against the 3rd defendant are as follows:

(a) arranging the transfer of the said land unto him knowing that the said assignment was no longer in force as the balance of purchase price had not been paid with in the period stated therein;
(b) failing to pay the balance of purchase price on or before the said 14 July 1979;
(c) accepting the said transfer of the said land without paying the balance of the said purchase price and knowing fully that the said assignment was no longer in force;
(d) accepting the said transfer in order to defraud the plaintiffs.

As stated earlier although it is pleaded in para. 3 of the statement of claim that the 3rd defendant failed to pay the balance of the purchase price of RM36,000 on or before 14 July 1979, the uncontradicted evidence shows that the plaintiffs accepted RM10,000 on 12 July 1979 and the 3rd defendant promised in a letter (see bundle "C", memorandum) to settle the balance of RM26,000 by "end of July 1979." It is strange that their present solicitors of the plaintiffs were not aware of this fact; para. 3 of the statement of claim was not amended at all.

Clause 3 of the assignment also provided for an alternative date by which the 3rd defendant had to pay Mr. Khoo the balance of the purchase price - ... On or before 14 July 1979, (which was extended by the plaintiffs to the end of July 1979) or "the date of approval of the assignment" by the 1st plaintiff. The approval by the 1st defendant was given on 8 August 1979. Although this date passed by the plaintiffs did nothing to pursue what ever remedy he had against the 3rd defendant until 5 July 1982 by which time the 3rd defendant had performed his part of the contract.

The evidence shows that the plaintiffs retained Mr. Khoo sometime in May 1979, as their solicitor. In 30 June 1983, Mr. Khoo wrote to them a letter (bundle "B3", p. 7) telling them that he had received the sum of RM22,000 from the solicitors of the 3rd defendant and stating

that since they still had not settled their loan with the 2nd defendant he was forwarding that sum to the 2nd defendant towards settlement of their loan with the 3rd defendant if he did not hear from them within 7 days from the date of the letter.

On 5 July 1983, the present solicitors of the plaintiff wrote to Mr. Khoo to claim that the said assignment (executed between the plaintiffs and Low Hut Rim, 3rd defendant) is null and void and our clients no longer wish to assign the ... land to Low Huat Kim .. and requested that the sum of RM22,000 be refunded to the 3rd defendant' solicitors. The letter also requested Mr. Khoo to refrain from further acting on the plaintiffs' behalf on the matter.

The point is that between sometime in May 1979 and June 1983, Mr. Khoo was the plaintiffs' solicitor and he, as agent for the plaintiffs, had accepted the sum of RM22,000 paid by the 3rd defendant through his solicitors on 26 June 1983. Mr. Khoo's unchallenged evidence was to the effect that up to the time he received the sum from the 3rd defendant's solicitor the plaintiffs had not instructed him to repudiate or rescind the assignment. Mr. Khoo said he was in communication with the plaintiffs because every now and then he would be receiving communication about the accumulation of interest on the balance owed by the plaintiff to the 2nd defendant. By Mr. Khoo accepting the payment as the solicitor for the plaintiffs, the condition which the plaintiffs agreed in regard to payment by the 3rd defendant by "end of July 1979" and we have to remind ourselves that this condition which was a variation of the condition in Clause 3 of the assignment was not pleaded or the condition to pay by the date of approval of the assignment - was varied and therefore there was no breach of contract. With payment accepted the contract had been performed.

The onus of proof of fraud is proof beyond reasonable doubt see *Saminathan v. Papa* [1981]1 MLJ 121 but in the prevent case there is not an iota of evidence to support the plaintiffs' allegation of fraud against the 3rd defendant whether of himself alone or in collusion with the lst and 2nd defendants. The plaintiffs' claim against the 3rd defendant must also fail.

Counterclaim of the 3rd Defendant

The 3rd defendant alleges that on or before entering into the deed of assignment the plaintiffs failed to disclose that the said land was encumbered and that it could not be transferred as it exceeded the non-bumiputra quota. He claimed that this amounted to fraudulent misrepresentation of fact to the 3rd defendant by the plaintiffs and he suffered loss and damage for relying on the fraudulent misrepresentation.

There was nothing in the evidence which showed that at the time the plaintiffs assigned their rights in the land to the 3rd defendant the plaintiffs knew that the land was subject to a bumiputra quota and that the sale had exceeded the quota. The counterclaim of the 3rd defendant cannot stand.

There was also a counterclaim that the plaintiffs had defamed the 3rd defendant but no evidence was adduced nor any submission made in this regard.

To sum up the plaintiffs have abandoned their claim against the 1st defendant. As for their claim against the 2nd defendant it has not been made out and their action against the 2nd defendant is dismissed with costs.

In regard to their claims against the 3rd defendant they too have not been made out and their action against him is dismissed with costs. The 3rd defendant on the other hand has not made out his counterclaim against the plaintiffs and it is dismissed with costs.